

# HOUSE BILL No. 5474

December 1, 2005, Introduced by Reps. Mortimer, Wojno, Gaffney, Taub and Schuitmaker  
and referred to the Committee on Health Policy.

A bill to amend 1931 PA 328, entitled  
"The Michigan penal code,"  
by amending section 145c (MCL 750.145c), as amended by 2004 PA 478.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1       Sec. 145c. (1) As used in this section:

2       (a) "Appears to include a child" means that the depiction  
3       appears to include, or conveys the impression that it includes, a  
4       person who is less than 18 years of age, and the depiction meets  
5       either of the following conditions:

6       (i) It was created using a depiction of any part of an actual  
7       person under the age of 18.

8       (ii) It was not created using a depiction of any part of an  
9       actual person under the age of 18, but all of the following apply  
10      to that depiction:

11      (A) The average individual, applying contemporary community

1 standards, would find the depiction, taken as a whole, appeals to  
2 the prurient interest.

3 (B) The reasonable person would find the depiction, taken as a  
4 whole, lacks serious literary, artistic, political, or scientific  
5 value.

6 (C) The depiction depicts or describes a listed sexual act in  
7 a patently offensive way.

8 (b) "Child" means a person who is less than 18 years of age,  
9 subject to the affirmative defense created in subsection (6)  
10 regarding persons emancipated by operation of law.

11 (c) "Commercial film or photographic print processor" means a  
12 person or his or her employee who, for compensation, develops  
13 exposed photographic film into movie films, negatives, slides, or  
14 prints; makes prints from negatives or slides; or duplicates movie  
15 films or videotapes.

16 (d) "Computer technician" means a person who installs,  
17 maintains, troubleshoots, upgrades, or repairs computer hardware,  
18 software, personal computer networks, or peripheral equipment.

19 (e) "Contemporary community standards" means the customary  
20 limits of candor and decency in this state at or near the time of  
21 the alleged violation of this section.

22 (f) "Erotic fondling" means touching a person's clothed or  
23 unclothed genitals, pubic area, buttocks, or, if the person is  
24 female, breasts, or if the person is a child, the developing or  
25 undeveloped breast area, for the purpose of real or simulated overt  
26 sexual gratification or stimulation of 1 or more of the persons  
27 involved. Erotic fondling does not include physical contact, even

1 if affectionate, that is not for the purpose of real or simulated  
2 overt sexual gratification or stimulation of 1 or more of the  
3 persons involved.

4 (g) "Erotic nudity" means the lascivious exhibition of the  
5 genital, pubic, or rectal area of any person. As used in this  
6 subdivision, "lascivious" means wanton, lewd, and lustful and  
7 tending to produce voluptuous or lewd emotions.

8 (h) "Listed sexual act" means sexual intercourse, erotic  
9 fondling, sadomasochistic abuse, masturbation, passive sexual  
10 involvement, sexual excitement, or erotic nudity.

11 (i) "Masturbation" means the real or simulated touching,  
12 rubbing, or otherwise stimulating of a person's own clothed or  
13 unclothed genitals, pubic area, buttocks, or, if the person is  
14 female, breasts, or if the person is a child, the developing or  
15 undeveloped breast area, either by manual manipulation or self-  
16 induced or with an artificial instrument, for the purpose of real  
17 or simulated overt sexual gratification or arousal of the person.

18 (j) "Passive sexual involvement" means an act, real or  
19 simulated, that exposes another person to or draws another person's  
20 attention to an act of sexual intercourse, erotic fondling,  
21 sadomasochistic abuse, masturbation, sexual excitement, or erotic  
22 nudity because of viewing any of these acts or because of the  
23 proximity of the act to that person, for the purpose of real or  
24 simulated overt sexual gratification or stimulation of 1 or more of  
25 the persons involved.

26 (k) "Prurient interest" means a shameful or morbid interest in  
27 nudity, sex, or excretion.

1           (l) "Child sexually abusive activity" means a child engaging in  
2 a listed sexual act.

3           (m) "Child sexually abusive material" means any depiction,  
4 whether made or produced by electronic, mechanical, or other means,  
5 including a developed or undeveloped photograph, picture, film,  
6 slide, video, electronic visual image, computer diskette, computer  
7 or computer-generated image, or picture, or sound recording which  
8 is of a child or appears to include a child engaging in a listed  
9 sexual act; a book, magazine, computer, computer storage device, or  
10 other visual or print or printable medium containing such a  
11 photograph, picture, film, slide, video, electronic visual image,  
12 computer, or computer-generated image, or picture, or sound  
13 recording; or any reproduction, copy, or print of such a  
14 photograph, picture, film, slide, video, electronic visual image,  
15 book, magazine, computer, or computer-generated image, or picture,  
16 other visual or print or printable medium, or sound recording.

17           (n) "Sadomasochistic abuse" means either of the following:

18           (i) Flagellation or torture, real or simulated, for the purpose  
19 of real or simulated sexual stimulation or gratification, by or  
20 upon a person.

21           (ii) The condition, real or simulated, of being fettered,  
22 bound, or otherwise physically restrained for sexual stimulation or  
23 gratification of a person.

24           (o) "Sexual excitement" means the condition, real or  
25 simulated, of human male or female genitals in a state of real or  
26 simulated overt sexual stimulation or arousal.

27           (p) "Sexual intercourse" means intercourse, real or simulated,

1 whether genital-genital, oral-genital, anal-genital, or oral-anal,  
2 whether between persons of the same or opposite sex or between a  
3 human and an animal, or with an artificial genital.

4 (2) A person who persuades, induces, entices, coerces, causes,  
5 or knowingly allows a child to engage in a child sexually abusive  
6 activity for the purpose of producing any child sexually abusive  
7 material, or a person who arranges for, produces, makes, or  
8 finances, or a person who attempts or prepares or conspires to  
9 arrange for, produce, make, or finance any child sexually abusive  
10 activity or child sexually abusive material is guilty of a felony,  
11 punishable by imprisonment for not more than 20 years, or a fine of  
12 not more than \$100,000.00, or both, if that person knows, has  
13 reason to know, or should reasonably be expected to know that the  
14 child is a child or that the child sexually abusive material  
15 includes a child or that the depiction constituting the child  
16 sexually abusive material appears to include a child, or that  
17 person has not taken reasonable precautions to determine the age of  
18 the child.

19 (3) A person who distributes or promotes, or finances the  
20 distribution or promotion of, or receives for the purpose of  
21 distributing or promoting, or conspires, attempts, or prepares to  
22 distribute, receive, finance, or promote any child sexually abusive  
23 material or child sexually abusive activity is guilty of a felony,  
24 punishable by imprisonment for not more than 7 years, or a fine of  
25 not more than \$50,000.00, or both, if that person knows, has reason  
26 to know, or should reasonably be expected to know that the child is  
27 a child or that the child sexually abusive material includes a

1 child or that the depiction constituting the child sexually abusive  
2 material appears to include a child, or that person has not taken  
3 reasonable precautions to determine the age of the child. This  
4 subsection does not apply to the persons described in section 7 of  
5 1984 PA 343, MCL 752.367.

6 (4) A person who knowingly possesses any child sexually  
7 abusive material is guilty of a felony punishable by imprisonment  
8 for not more than 4 years or a fine of not more than \$10,000.00, or  
9 both, if that person knows, has reason to know, or should  
10 reasonably be expected to know the child is a child or that the  
11 child sexually abusive material includes a child or that the  
12 depiction constituting the child sexually abusive material appears  
13 to include a child, or that person has not taken reasonable  
14 precautions to determine the age of the child. This subsection does  
15 not apply to any of the following:

16 (a) A person described in section 7 of 1984 PA 343, MCL  
17 752.367, a commercial film or photographic print processor acting  
18 pursuant to subsection (8), or a computer technician acting  
19 pursuant to subsection (9).

20 (b) A police officer acting within the scope of his or her  
21 duties as a police officer.

22 (c) An employee or contract agent of the department of social  
23 services acting within the scope of his or her duties as an  
24 employee or contract agent.

25 (d) A judicial officer or judicial employee acting within the  
26 scope of his or her duties as a judicial officer or judicial  
27 employee.

1 (e) A party or witness in a criminal or civil proceeding  
2 acting within the scope of that criminal or civil proceeding.

3 (f) A physician, psychologist, ~~limited license psychologist,~~  
4 professional counselor, or registered nurse licensed under the  
5 public health code, 1978 PA 368, MCL 333.1101 to 333.25211, acting  
6 within the scope of practice for which he or she is licensed.

7 (g) A social worker ~~registered~~ **LICENSED** in this state under  
8 article 15 of the public health code, 1978 PA 368, MCL 333.16101 to  
9 333.18838, acting within the scope of practice for which he or she  
10 is ~~registered~~ **LICENSED**.

11 (5) Expert testimony as to the age of the child used in a  
12 child sexually abusive material or a child sexually abusive  
13 activity is admissible as evidence in court and may be a legitimate  
14 basis for determining age, if age is not otherwise proven.

15 (6) It is an affirmative defense to a prosecution under this  
16 section that the alleged child is a person who is emancipated by  
17 operation of law under section 4(2) of 1968 PA 293, MCL 722.4, as  
18 proven by a preponderance of the evidence.

19 (7) If a defendant in a prosecution under this section  
20 proposes to offer in his or her defense evidence to establish that  
21 a depiction that appears to include a child was not, in fact,  
22 created using a depiction of any part of an actual person under the  
23 age of 18, the defendant shall at the time of the arraignment on  
24 the information or within 15 days after arraignment but not less  
25 than 10 days before the trial of the case, or at such other time as  
26 the court directs, file and serve upon the prosecuting attorney of  
27 record a notice in writing of his or her intention to offer that

1 defense. The notice shall contain, as particularly as is known to  
2 the defendant or the defendant's attorney, the names of witnesses  
3 to be called in behalf of the defendant to establish that defense.  
4 The defendant's notice shall include specific information as to the  
5 facts that establish that the depiction was not, in fact, created  
6 using a depiction of any part of an actual person under the age of  
7 18. Failure to file a timely notice in conformance with this  
8 subsection precludes a defendant from offering this defense.

9 (8) If a commercial film or photographic print processor  
10 reports to a law enforcement agency having jurisdiction his or her  
11 knowledge or observation, within the scope of his or her  
12 professional capacity or employment, of a film, photograph, movie  
13 film, videotape, negative, or slide depicting a person that the  
14 processor has reason to know or reason to believe is a child  
15 engaged in a listed sexual act; furnishes a copy of the film,  
16 photograph, movie film, videotape, negative, or slide to a law  
17 enforcement agency having jurisdiction; or keeps the film,  
18 photograph, movie film, videotape, negative, or slide according to  
19 the law enforcement agency's instructions, both of the following  
20 shall apply:

21 (a) The identity of the processor shall be confidential,  
22 subject to disclosure only with his or her consent or by judicial  
23 process.

24 (b) If the processor acted in good faith, he or she shall be  
25 immune from civil liability that might otherwise be incurred by his  
26 or her actions. This immunity extends only to acts described in  
27 this subsection.



1           (9) If a computer technician reports to a law enforcement  
2 agency having jurisdiction his or her knowledge or observation,  
3 within the scope of his or her professional capacity or employment,  
4 of an electronic visual image, computer-generated image or picture  
5 or sound recording depicting a person that the computer technician  
6 has reason to know or reason to believe is a child engaged in a  
7 listed sexual act; furnishes a copy of that image, picture, or  
8 sound recording to the law enforcement agency; or keeps the image,  
9 picture, or sound recording according to the law enforcement  
10 agency's instructions, both of the following shall apply:

11           (a) The identity of the computer technician shall be  
12 confidential, subject to disclosure only with his or her consent or  
13 by judicial process.

14           (b) If the computer technician acted in good faith, he or she  
15 shall be immune from civil liability that might otherwise be  
16 incurred by his or her actions. This immunity extends only to acts  
17 described in this subsection.

18           (10) This section applies uniformly throughout the state and  
19 all political subdivisions and municipalities in the state.

20           (11) A local municipality or political subdivision shall not  
21 enact ordinances, nor enforce existing ordinances, rules, or  
22 regulations governing child sexually abusive activity or child  
23 sexually abusive material as defined by this section.

24           Enacting section 1. This amendatory act does not take effect  
25 unless Senate Bill No.\_\_\_\_ or House Bill No. 5473(request no.  
26 04692'05) of the 93rd Legislature is enacted into law.